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HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 447

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,
FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Petitioner.

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Your petitioner, City and County of San Francisco, a municipal corporation, respectfully prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court, holding that petitioner was liable for the sum of

$27,313.32 in violation of the Raker Act, Public Law 41, 38 Stats. at L. 242.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on May 27, 1955 (R. 103). A petition for rehearing was filed on June 24, 1955; and an order amending opinion and denying petition for rehearing was filed on August 19, 1955, and application for stay of mandate was filed on August 26, 1955, and the mandate was by the said Court of Appeals on that day ordered stayed until disposition of this petition. The jurisdiction of this court is invoked under 28 USCA §1254(1).

OPINION BELOW.

The opinion of the Court of Appeals appears in the appendix of this petition as Exhibit "A".

QUESTIONS PRESENTED FOR REVIEW.

1. In the enactment of the Raker Act (Public Law No. 41; 38 Stats. at L. 242) did not Congress give to the Secretary of the Interior the complete power to interpret and administer the rights and obligations and make decisions under the Act, that would empower him to enter into the contract of October 27, 1932 with the City and County of San Francisco,

whereby the petitioner paid $1,250,000.00 to the United States to be relieved of its obligations for the maintenance and repair of roads under Section 9(q) of the Raker Act?

2. Is it the determination of this court that petitioner is forbidden to rely upon the administrative interpretation of the Raker Act by the Secretary of the Interior before entering into a contract with the Department of the Interior, regarding petitioner's obligations under the Act and must continuously resort to Congressional sanction in order to protect itself from unwarranted demands by unilateral opinions of succeeding Secretaries of the Interior?

3. Has not the City and County of San Francisco reasonably complied with all the conditions and requirements of the Raker Act?

4. Is it not true, that the United States is functioning in its *proprietary* capacity in the administration of the Raker Act and should be treated as an ordinary proprietor?

5. Acting in its proprietary capacity, is it not true that equitable estoppel should be invoked against respondent in the case at bar?

STATEMENT OF THE CASE.

The petitioner herein deems it necessary to give a complete factual background of the controversy, in order that this court will have a full insight into the questions involved.

In 1900 the far-seeing Honorable James D. Phelan, then Mayor of San Francisco and later United States Senator, recognized the great need for water to meet the future needs of San Francisco.

He personally filed for water rights on the Tuolumne River, purchased land in the Hetch Hetchy Valley and other areas in the Sierra-Nevada Mountain range, all of which he transferred to the City, so that, one day, San Francisco would obtain an adequate supply of water for domestic, commercial uses and fire protection.

Four Congressional Sessions labored with proposed measures granting San Francisco certain rights to construct dams, conduits and rights of way in the Yosemite National Park and Stanislaus National Forest for a water supply before the Raker Act (Acts of 63rd Congress, Public Law No. 41; 38 Stats. at L. 242) was accorded passage in 1913.

In order to have a clear conception of the issue at bar, it is necessary to revert to the historical background of the Raker Act.

Factually, San Francisco owned two-thirds of the Hetch Hetchy Valley located about forty miles from Yosemite National Park. Hetch Hetchy Valley was taken into the Yosemite National Park in 1919 and subsequent to the acquisition of property and water rights acquired by San Francisco. San Francisco also owned valuable land in Cherry Valley, Lake Eleanor and in other adjacent areas.

In Hetch Hetchy Valley, there was a narrow gorge between two mountains that could be dammed to

retain the rainfall and melting snows for a supply of needful water to San Francisco, without depriving the Modesto and Turlock Irrigation Districts, owning down stream water rights, other irrigation districts and riparian owners of their rights, from the flow of the Tuolumne River which was the outlet for the seasonal rainfall and melting snow.

In order for San Francisco to capture this supply of water, it was necessary to obtain permission of the United States to transport this water through the Yosemite National Park, as well as parts of the Stanislaus National Forest.

It is to be noted that in 1913, neither the United States nor San Francisco could have used the Hetch Hetchy Valley. San Francisco owned in fee, two-thirds of the floor, and was in a position to block the United States in any program it contemplated, without its resorting to condemnation. San Francisco had other valuable properties needed by the United States in the Cherry Valley and Lake Eleanor regions.

Nor, could San Francisco use its property for the purpose intended without permission of the United States.

Stalemated in the ownership of the valley, San Francisco needing a water supply, the United States desiring to aid its embryonic national park system, collaborated in the enactment of the Raker Act.

Read in its historical background, the Raker Act was a bargain between two land owners—San Fran-

cisco wanted rights of way through an undeveloped park to convey water and to build a dam; the United States wanted additional land and a monetary consideration for the development of the Yosemite National Park and other parks.

Two sovereign powers, divesting themselves of strictly governmental functions, descended into the realm of ordinary landowners—*proprietors.*

In consideration of the grant of rights of way, through the Yosemite National Park and the privilege of building a dam, at an initial cost of $77,000,000, San Francisco deeded to the United States more land than the Government owned in the Hetch Hetchy Valley, and after five years agreed to pay $15,000 for ten years, $20,000 for the next ten years, and forever thereafter $30,000 per year, unless changed by Congress, for the maintenance of roads and trails in Yosemite National Park and other national parks in the State of California. And in addition, so needful for water, San Francisco promised and as provided in the Raker Act, to and did build over $1,000,000 worth of roads and trails in Yosemite National Park.

Under Section 9(p) of the Raker Act, the City, in 1930, constructed a trail along the north side of the Hetch Hetchy Reservoir Site and designated Rancheria Falls as the terminus of said trail. In 1931, the City constructed a trail leading from Rancheria Falls to Tiltill Valley to Lake Vernon. And in the same year (beyond the roads and trails designated in the Raker Act) constructed a trail from Rancheria Creek

over Rancheria Mountain to a junction with Bear Valley and Pleasant Valley trails. The cost of the above roads and trails to the City was $82,670.04 (Tr. p. 14).

Prior to the 7th day of July 1927, pursuant to the terms of Section 9 (p) of the Raker Act, the City constructed a road from the Hetch Hetchy Dam to Lake Eleanor via McGill Meadow and a trail from Lake Eleanor to Cherry Valley, at a total expenditure of $60,000.00 (Tr. p. 15).

In 1915, in compliance with Section 9 (p) of the Act, the City built a road from Hamilton or Smith's Station adjacent to its aqueduct from Groveland to Portuloca or Hog Ranch (Mather) and to Hetch Hetchy Dam Site at a cost of $180,000.00 (Tr. p. 15). In 1932, the City improved this road from Mather (formerly Hog Ranch) to the Hetch Hetchy Reservoir by installing a bituminous surface, numerous curvature changes, guard walls of stone, designated by the Secretary of the Interior, at an additional sum of $173,500.91 (Tr. p. 15).

At the request of the Secretary of the Interior, the road along the southerly slope of Smith's Peak from Hog Ranch (Mather) past Harden Lake was not constructed as provided in Section 9 (p) of the Raker Act. In compliance, however, with Section 9 (p) of the Act, the City expended the sum of $496,170.95.

Aside from the above expenditure, the City under Section 7 of the Raker Act, paid the following sums, 1919 to 1928, inclusive, $150,000.00; 1929 to 1938, in-

clusive, $200,000.00; 1939 to 1948, $300,000.00, or a total of $650,000.00.

Prior to December 1930, a misunderstanding arose between the parties as to the respective rights and obligations of each, as to distribution of power and particularly as to the construction of roads and trails. There were indications from Washington, that the Secretary of the Interior should declare a forfeiture of the City's rights under the provisions of the Act. The City, on the 4th day of December, 1930, submitted a program whereby it offered to complete certain roads, convey certain property to the United States and pay $1,250,000.00 as set forth in the program (Tr. pp. 16 to 19 inc.). On the 8th day of December, 1930, the Secretary of Interior replied in part as follows:

> "I have received with letter of transmittal dated December 8, 1930, signed by Senators Hiram W. Johnson and Samuel M. Shortridge and Representatives Richard J. Welch and Harry L. Englebright, argument presented by the Committee representing the City and County of San Francisco at conference in this Department on December 4, 1930, in regard to the existing arrangements for the distribution of power from the Hetch Hetchy project in Yosemite National Park, *together with tentative agreement reached in conference of said Committee with the Director of the National Park Service on December 5 and 6, 1930, relative to the City's obligations as to the construction of roads and trails in the park under the Raker Act, said agreement being subject to*

final approval by the Board of Supervisors of San Francisco.

"I have carefully considered the proposal of the City relative to a fulfillment of its road and trail construction obligations under the Raker Act and have to advise that the program submitted, if approved by the Board of Supervisors, will fully satisfy the demands of this Department as to such construction as provided for under said Act." (Tr. pp. 19, 20-21.)

On October 27, 1932, an Agreement after approval by the Board of Supervisors of San Francisco was finally signed (Tr. p. 27). This Agreement, termed a Second Supplemental Agreement (a misnomer, for it was the only Agreement), approved the program as submitted on the 4th day of December, 1930, and endeavoring to clarify and simplify the 1930 proposal, it contained this provision, among others, "That the City of San Francisco will no longer maintain any roads or trails within the boundaries of Yosemite National Park" (Tr. p. 28, §3).

Under the Contract of 1932, in addition to the sums heretofore stated, the following roads and trails were constructed at a cost tabulated opposite each item:

TABULATION OF SAN FRANCISCO DONATION FUNDS.

Map Reference	Route Number	Name	Type or Work	Amount Authorized
1	4	Tioga Road, Tuolumne Meadows-Tioga Pass Section	Grading	$ 233,447.56
2	4	Tioga Road	Survey	14,852.42
3	4	Tioga Road, Crane Flat-White Wolf Section	Grading	471,200.02
4	4	Tioga Road, Tuolumne Meadows-Tioga Pass Section	Surfacing	202,395.52*
5	4	Tioga Road, Crane Flat-White Wolf Section	Bridge	37,000.00*
6	4	Tioga Road, Crane Flat-White Wolf Section	Clearing	8,689.66
7	3	Big Oak Flat Road	Grading	26,413.02
		Sub-Total		$ 993,998.20
		Property Purchased (Right of Way)		6,000.00
		Impounded Funds (Under Economy Act Legislation)		1.80
		TOTAL		$1,000,000.00
		Not yet programmed		250,000.00
		GRAND TOTAL		$1,250,000.00

*Projects not yet completed.

September 3, 1937

All of said projects mentioned in said tabulation have been completed and at the costs therein mentioned.

This tabulation was supplied by the United States on the 18th of September, 1937. There are two notable features to this account, namely: (a) All of the roads mentioned in the tabulation are not specified in the Raker Act; (b) There was remaining in said fund, unspent and unprogrammed, the sum of $250,000.00.

On September 8, 1939, the United States made a demand in writing for the sum of $27,313.82 for the

actual cost of maintenance and repairs of roads and trails in Yosemite National Park, for the fiscal years of 1929 to 1940, in accordance with the Raker Act, Section 9 (q) thereof. This demand and liability were denied by the City.

REASONS FOR ALLOWANCE OF THE WRIT.

I. **PETITIONER CONTENDS THAT THE SECRETARY OF THE INTERIOR UNDER THE RAKER ACT (ACTS OF 63rd CONGRESS, PUBLIC LAW NO. 41; 38 STATS. AT L. 242) WAS GIVEN THE POWER AND AUTHORITY TO ENTER INTO A CONTRACT WITH PETITIONER ON OCTOBER 27, 1932, WHEREBY THE PETITIONER, IN CONSIDERATION OF THE PAYMENT OF $1,250,000 TO RESPONDENT, WAS RELIEVED FROM ANY FURTHER OBLIGATION UNDER THE RAKER ACT FOR THE MAINTENANCE OF ROADS, TRAILS AND BRIDGES IN YOSEMITE NATIONAL PARK OTHER THAN UNDER SECTION 7 OF SAID ACT.**

If the interpretation given to the Raker Act by the lower courts is sustained it will forever leave the City and County of San Francisco in a legal abyss. Such an interpretation will forbid the Secretary of the Interior and the City and County of San Francisco entering into any understanding of their respective obligations under the Raker Act, without first seeking Congressional approval.

Congress reserved for itself under Section 7 of the Raker Act the right to raise or lower the payments to respondent to be applied to the maintenance of roads and trails and other improvements in Yosemite National Park and other national parks in the State of California. Today the City and County of San Francisco pays annually $30,000.00 for the mainte-

nance and building of roads in Yosemite National Park and other parks in the State of California.

There is no dispute that all payments have been made and are being made under the provisions of Section 7 of the Act.

Aside from Section 7, the Secretary of the Interior is empowered to administer the Act; to approve or disapprove or order what the grantee (City and County of San Francisco) shall or shall not do.

The Act in forty-two other instances empowers the Secretary of the Interior and delegates to him the enforcement and interpretation of the provisions of the Act.

This Court's attention is specifically directed to the following provisions of the Act. We quote and italicize:

Section 9 (p) provides, in part:

> "That all trail and road building *and* maintenance by the said grantee in the *Yosemite National Park* and the Stanislaus National Forest *shall be done subject to the direction and approval of the Secretary of the Interior . . .*"

and, Section 9 (r) provides:

> "That in case the Department of the Interior is called upon, *by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act,* which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee."

Clearly, under the above sections cited, the agreement of October 27, 1932, was under *the direction and met with the approval* of the Secretary of the Interior, in his effort, "to determine the rights, benefits and obligations specified in the Act."

That the administration of the Raker Act was under the *direction* of the Secretary of the Interior is indisputable. The meaning of such phraseology in a statute is ably defined in *Thomas Knight v. The United Land Association, et al.,* 142 U.S. 161, where it is stated:

> *"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head."*

In *Williams v. U.S.,* 138 U.S. 514, the doctrine was laid down for the Interior Department how it was to administer the lands under its jurisdiction.

> " 'It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.' "

The contract of 1932, whereby the respondent accepted the payments of $1,250,000.00, was nothing more than a pattern of payments in advance in compliance with Section 9 (q) of the Raker Act. There remains to date the sum of $250,000.00 in the San Francisco Donation Funds and held by the respondent for the purposes outlined and the considerations set forth in the agreement of October 27, 1932.

The Court of Appeals in its opinion read subdivision (q) of Section 9, separately. It is petitioner's contention that all the pertinent subdivisions of Section 9 must be interpreted and read as a whole. If this is done, subdivision (r) of Section 9 modifying subdivision (q) of Section 9, empowers the Secretary of the Interior *to make investigations and decisions respecting the rights, benefits or obligations specified in the Act* and the right to enter into the contract of October 27, 1932.

The record necessitates a clear pronouncement of this Court what interpretation is to be given by an administrative agency of the federal government in dealing with a minor governmental agency which has relied upon a contract, whereby its taxpayers expended $1,250,000.00 to satisfy a purported obligation.

II. THE COURT OF APPEALS' EXCERPTS FROM THE CONGRESSIONAL RECORD MISINTERPRET THE SECTION OF THE RAKER ACT REFERRED TO IN THE CONGRESSIONAL DEBATES.

The excerpts of the Congressional Record injected into the Court of Appeals' opinion referred to Section 7 of the Raker Act through pages 3900 to 3922 of the Congressional Record, Vol. 50, 63rd Congress. It is obvious that Congressmen Raker, Elder, Baltz, Cooper, Kahn, Willis, Simms, Mondell and Knowland were speaking of Section 7 of the Act and in no place referred to Section 9 (q).

It has been admitted that the petitioner has complied *in toto* with all of the provisions of Section 7 and has fulfilled its every obligation under said section.

Petitioner categorically states that Congress is still empowered to raise the annual payments provided for under Section 7 of the Act but emphasizes that the Court of Appeals and the District Court committed reversible error in predicating their opinions and decisions upon Section 7 of the Act.

III. THE DECISION RENDERED IN UNITED STATES v. CITY AND COUNTY OF SAN FRANCISCO, 310 U.S. 16, IS NOT IN ISSUE AND THE COURT OF APPEALS AND THE DISTRICT COURT RELYING UPON THAT DECISION COMMITTED REVERSIBLE ERROR.

Both of the lower courts have decided this Court's decision in *U.S. v. City and County of San Francisco,* 310 U.S. 16, as determining the issue in the present

case. *That case rested solely upon Section 6 of the Raker Act.*

The question involved was whether the City and County of San Francisco had the right to sell electric power to a private power company for transmission of the energy into San Francisco.

There was no written agreement with the Secretary of the Interior, such as we have in the present case. There was no investigation to determine the obligations of the City and County of San Francisco and the Interior Department under the Raker Act, as in the present case. Nor, was there any payment of $1,250,000.00 by one governmental agency to another after investigation to determine the obligations of the grantee, as was done in the case at bar. Further, there was no report to Congress prior to the decision in the case of U.S. v. City and County of San Francisco, supra, as was done by Congressman Cramton, Michigan, Congressional Record Third Session, Vol. 73, No. 7, Tuesday, December 9, 1930, Appendix 475, wherein it is related that responsible officials of San Francisco, including Senator Johnson, Senator Shortridge and Congressmen Englebright and Welch, conferred with the Secretary of the Interior before the agreement of October 27, 1932 was made.

The Court of Appeals premises its decision upon United States v. City and County of San Francisco, (supra) with this interpretation of the facts, we quote: "The Department of the Interior wrongfully interpreted the law as permitting such action by the City and otherwise by the Department's conduct authorized the violation." (R. 102.)

Justice Black, delivering the opinion in *United States v. City and County of San Francisco* (supra), stated at pages 31-32:

> "A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed § 6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government. *Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful.* Certain it is, however, that in 1935 the Secretary of the Interior declared the City's disposition of the power through the Company to be a violation of § 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings—*such as those here relied on*—can thwart the plain purpose of a valid law." (Emphasis added.)

There is a vast difference between "tolerating a condition as a temporary expendient" and stating "the Department of the Interior wrongfully interpreted the law."

In the instant case there was no toleration of a condition as a temporary expedient; rather there was active participation by the Department of the Interior in formulating the agreement of October 27, 1932.

It is submitted that the Court of Appeals and the District Court, relying upon *United States v. City and County of San Francisco* (supra), as the basis for their decisions in the case at bar, committed reversible error.

IV. THE COURT OF APPEALS' DECISION IN FAILING TO FIND THAT THE CONTEMPORANEOUS AND ADMINISTRATIVE CONSTRUCTION OF THE RAKER ACT EMPOWERED THE SECRETARY OF THE INTERIOR TO ENTER INTO THE CONTRACT OF OCTOBER 27, 1932 WITH PETITIONER IS REVERSIBLE ERROR.

59 C.J. (Statutes) 1025:

> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, *especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for a long period of time.*"

Every element of good faith was exercised by the Department of the Interior and petitioner on entering into the contract of October 27, 1932.

The respondent's claim of debt in the amount of $27,313.32 was from the fiscal year 1929 to 1940 (Bill of Particulars, Tr., p. 9). During that very period the Department of the Interior entered into the contract of 1932 which called for $1,250,000.00 in payments of $250,000.00 each from 1932 to 1936 upon the same debt supposedly being liquidated. Nineteen (19) years (1929-1948) elapsed before respondent filed an action upon this purported indebtedness!

It is inconceivable that petitioner would have made the first payment of $250,000.00 in 1932 for the maintenance and repair of roads under Section 9(q) of the Raker Act if there was any doubt as to the legality of the contract.

Is it to be said that the Department of the Interior was so unconscionable as to enter into the contract of 1932, accept payments thereunder, and, at the same time, knowingly violate the provisions of the Raker Act?

Able, upright and honest officials of the United States and of the City and County of San Francisco felt that in entering into the agreement of 1932 there was a proper interpretation of the Raker Act and that the Secretary of the Interior was so empowered.

In *McLaren v. Fleischer* (1919), 181 Cal. 607 (affirmed in 256 U.S. 477) the Court states:

> "The construction placed upon an act of Congress by the land department with respect to the disposition of public lands, and its practical application thereof is always given great weight by the courts in construing the law and is followed if it is at all reasonable."

The decision of the Court of Appeals would disregard the accrued rights of the petitioner in its reliance upon the interpretation of the Raker Act by successive Secretaries of the Interior.

In *Grand Trunk Western Railway Company v. United States,* (1949), 252 U.S. 112, this Court recognizes the principle:

> "It is true that when a department charged with the execution of a statute gives it a construction uniformly for a series of years, the Court will look with disfavor upon a change whereby parties who have contracted with the government upon the faith of that construction would be injured."

This Court in *United States v. The Alabama Great Southern Railroad Company* (1891), 142 U.S. 615, stated:

> "It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

Carried to their ultimate, the opinions of the Court of Appeals and the District Court in the case at bar state that regardless of the administrative power and the right to make decisions and determine obligations vested in a cabinet officer under a Congressional enactment, recourse must first be had and approval obtained from Congress if a party to an open cove-

nant mutually agreed upon is to avoid a subsequent court action by the determination, years later, that the cabinet officer's action was illegal and void.

Petitioner submits that the decisions of this Court are otherwise. If there is any doubt in the construction or interpretation of a statute, and parties have relied upon a practical construction, and rights have accrued by reason of such reliance, the injurious consequences that may result from upsetting the practical interpretation are such that the judicial mind will favor the officer's (cabinet) judgment. See: *Clement Studebaker v. John Perry* (1901), 184 U.S. 258.

The Court of Appeals' and District Court's failure to recognize the Secretary of the Interior's contemporaneous and administrative construction of the Raker Act, under which he validly entered into the contract of October 27, 1932, petitioner submits, is reversible error.

V. THE COURT OF APPEALS' ERRONEOUSLY CONSTRUING THE DOCTRINE OF ESTOPPEL IN THE CASE AT BAR CONSTITUTES REVERSIBLE ERROR.

Where the United States acts in a *proprietary* capacity or enters into contract relationships, an estoppel may be asserted against it, provided the functions of the government are not impaired thereby.

54 *Am. Jur.*, §124, pp. 631-632.

That Congress was impressed as to the "proprietary function" in which the government was acting

in granting to San Francisco the rights-of-way in Yosemite National Park is unequivocally stated by the proponents and antagonists of the Raker Act. See: *Congressional Records and Debates,* App. I, Vol. 50, 63rd Congress, First Session 1913.

Congress in the enactment of the Raker Act was not making a "gift" of the public domain, it was bargaining on a commercial basis for the exchange of lands and remuneration to enhance its ownership in Yosemite National Park. The Raker Act was and is in every respect *a contract* between two public bodies, each acting in a proprietary capacity.

That respondent had only a *proprietary* interest in Yosemite National Park is graphically set forth in the case of *Yosemite Park and Curry Company v. Collins,* 20 Fed. Supp. 1009 (reversed for other reasons 304 U.S. 518):

> "We agree that the United States had only a *proprietary* interest in the Valley (Yosemite) and that no jurisdiction passed from the United States to California or vice versa by virtue of the Acts of 1864 and 1905 alone. That much is conceded by plaintiff and by the United States."

And further:

> "When in 1890 the United States set aside certain of its public lands to establish the Park (Yosemite), *the federal interest was merely proprietary.* Jurisdiction of the lands comprising the Park was in the state, where it remained until 1919. In that year jurisdiction of the Park was offered to the national government, *which had always retained the proprietary interest.*"

Respondent stripped of its sovereignty, as it should be in the present case, must be treated as any other proprietor.

This court said in *Cooke v. United States*, 91 U.S. 389, page 57:

> ". . . Still a government may suffer loss through the negligence of its officers. *If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.*"

and

> ". . . Generally, in respect to all the commercial business of the government, *if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of the neglect. (Citing cases.)*"

And further:

> "*Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity.*"

Estoppel is not based solely on "tradition" of the law, or "so-called sound public policy", rather it is based upon principles of equity, morality and justice. That this principle of equity is imbedded in our national consciousness is well phrased in *United States v. Willamette Val. and C. M. Wagonroad Co.*, 54 Fed. 807:

> *"No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. . . . but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in Woodruff v. Trapnall that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."*

In the case at bar, construing the contract of 1932 entered into between the Secretary of the Interior and the City and County of San Francisco, as a settlement of the rights and obligations of the grantee under the Raker Act, estoppel is the only remedy that can be given to avoid a miscarriage of justice.

United States v. Big Bend Transit Co., 42 Fed. 459;

The Falcon and Powhattan, 19 Fed. 2d 1009;

Walker v. United States, 139 Fed. 409;

Monongahela Navigation Co. v. United States, 148 U.S. 312;

Woodruff v. Trapnall, 10 How. 190.

The refusal of the Court of Appeals and District Court to enforce equitable estoppel against respondent, we submit, constitutes reversible error.

CONCLUSION.

The United States acting through the Department of the Interior as a proprietor should be bound by considerations of morality and righteousness which ordinarily bind the conscience.

For the reasons herein stated, we respectfully submit that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 3, 1955.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,
FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,275 May 27, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge and HEALY and McALLISTER, Circuit Judges

DENMAN, Chief Judge:

Appellant, hereafter City, appeals from a judgment of the district court holding it liable to the United States for the actual cost of the latter's maintenance and repair of certain trails, roads and bridges in Yosemite National Park during the years 1929 to 1940.

Congress in the Raker Act, 38 Stat. 292, granted to San Francisco having rights to certain water in the Yosemite National Park Reservation, the right to erect and maintain dams, canals and other facil-

ities. To keep the Park open to visitors, campers and hikers and to facilitate San Francisco operations, roads and trails were constructed, the cost of which and their maintenance is to be paid by San Francisco, the latter under 9 (q) of the Act, providing:

> "That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir *and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.* [Emphasis added.]"

San Francisco does not question that in the years 1929 to 1940 the United States expended the amount of money claimed. The City's contentions are (A) that by an agreement with the Secretary of the Interior, which the United States concedes was made, it was relieved of the obligation of Section 9(q) and (B) that in any event the United States is estopped to deny the validity of the agreement.

A. We agree with the district court that Congress gave the Secretary of the Interior no power to make such an agreement. There is no merit to the contention that such right is given by the general provision of Section 9 (r) providing:

> "That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department

of the Interior, then such expense shall be borne by said grantee."

The city points out that the Raker Act in 42 instances gives the Secretary of the Interior various specific powers in administering the Act. None confers the power to abrogate the city's obligations under §9(q). Even if §9(r) were broad enough to give the secretary such power, which it does not, this requires the application of the rule that such a general provision is limited by the specific provisions, each conferring a lesser power. Baltimore Nat. Bank v. Tax Comm'r., 297 U.S. 209, 215.

Nor is there any merit to the contention that the administrative interpretation of a statute which is contrary to its clear meaning controls the construction of the Act. Jewell Ridge Corp. v. Local, 325 U. S. 161, 169; United States v. Phelps Dodge Mercantile Co., 157 F. 2d 453, 456 (Cir. 9); Cf. Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315.

Further in the Congressional debate over the Act, Congressman Raker, its author, clearly states that no cabinet or executive officer has any power to alter the conditions respecting the city's obligation to pay for the maintenance of the roads and trails, in the following from 50 Cong. Rec. 3900-3901:

"Mr. Elder: Is there any danger that San Francisco will come back at some time in the future and ask for an appropriation from the Government, as they did on a celebrated occasion in relation to an exposition?

"Mr. Raker: No; for many reasons.

"Mr. Elder: Well, I would like to hear them.

"Mr. Raker: The question is, they are getting this right, practically a purchase, *upon conditions provided for by this bill—not to be fixed by any Cabinet Officer or executive officer, but fixed in this bill by the Congress itself*—so there is every reason, it seems to me, why the city and county of San Francisco can not come back, because this grant, when made, compels the city and county of San Francisco to file with the Secretary of the Interior its regular acceptance of this grant, and therefore it is bound on that account just the same as any other grant by the Government—[Emphasis added]."

This was immediately followed by the statement of Congressman Kahn, a representative elected from San Francisco, as follows:

"Mr. Kahn: I want to call the attention of the gentleman from California to the fact that *Congress, under this bill, still retains complete control of the fixing of charges for the privileges granted.* [Emphasis added.]

"Mr. Raker: Yes.

"Mr. Kahn: *Under the terms of this bill Congress does not relinquish its right to fix the charges that will be paid by the city. It is not left to any executive officer, but it is always in the hands of the Congress of the United States.* [Emphasis added.]"

(B) *Estoppel.* There is no question that no statute of limitations applies to this case. Appellant argues that the United States is estopped to now

exert its claim by the action of the Secretary of the Interior together with appellee's long acquiescence of ten years before making a claim and nineteen years before bringing suit. Having determined that the Secretary's agreement is invalid, this contention is disposed of adversely to the city by the decision in United States v. City and County of San Francisco, 310 U. S. 16.

There the city in violation of the Raker Act had been disposing of its Hetch Hetchy power to public utilities. The Department of the Interior wrongly interpreted the law as permitting such action by the city and otherwise by the department's conduct authorized the violation. This, the city claimed, created an estoppel against the United States. In disposing of the contention the Supreme Court held at pages 31 and 32:

> "We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that '. . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.' [Citing Utah Power & Light Co. v. United States, 243 U. S. 389, 409.]"

The judgment is affirmed.

(Endorsed:) Opinion. Filed May 27, 1955.
Paul P. O'Brien, Clerk.

As amended by order of August 19, 1955.

United States Court of Appeals
for the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,275

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment.

Filed and Entered: May 27, 1955.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 447

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (R. 33-41) is reported at 112 F. Supp. 451. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 99-102) is reported at 223 F. 2d 737.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1955 (R. 103). A petition for rehearing, filed on June 24, 1955, was denied on August 19, 1955 (R. 104). The petition for a writ of certiorari was filed on October 4, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Supplemental Agreement of October 27, 1932, between petitioner and the Secretary of the Interior, releasing petitioner from its obligation under Section 9(q) of the Raker Act (38 Stat. 242) to reimburse the United States for the actual cost of maintenance of roads and trails in Yosemite National Park, was unauthorized by the Raker Act and hence void and illegal.

2. Whether the United States is estopped from asserting the invalidity of the Supplemental Agreement.

STATUTE INVOLVED

Sections 7, 9(p), 9(q) and 9(r) of the Raker Act (Act of December 19, 1913, 38 Stat. 242) are set forth in the Appendix, *infra*, pp. 23-25.

STATEMENT

"By the Raker Act of December 19, 1913, Congress granted the City and County of San Francisco, *subject to express conditions*, certain lands

and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest. The Act in terms declared that this, known as the 'Hetch-Hetchy' grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system 'for generation and sale and distribution of electric energy.'" *United States* v. *City and County of San Francisco,* 310 U.S. 16, 18 [emphasis added]. Section 9(u) of the Act provides that, in the event that the conditions specified in the Act are not complied with by the City, "it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act," 38 Stat. 250. One of the conditions specified in the Act is that the City shall reimburse the United States for the actual cost of maintenance of certain roads and trails in the Yosemite National Park. Section 9(q). In this action, the United States seeks to enforce that condition of the grant (R. 3-4). As revealed by the Agreed Statement filed by the parties (R. 8-31), the pertinent facts are as follows:

A. Petitioner's obligations under the Raker Act with respect to roads and trails in the Yosemite National Park are set forth in Sections 7, 9(p) and

9(q) of the Act. Section 9(p) (see Appendix, *infra*, pp. 24-25) provides that petitioner shall construct certain specified scenic roads and trails in the Yosemite National Park. In addition to these enumerated roads and trails (see *infra*, pp. 5-6), Section 9(p) requires petitioner to build "such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior." Apart from the roads and trails which petitioner is required to construct, Section 9(p) provides that petitioner "shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the * * * Secretary of the Interior in the Yosemite National Park." With respect to both categories of roads and trails, Section 9(p) directs that "all trail and road building and maintenance by the said grantee in the Yosemite National Park * * * shall be done subject to the direction and approval of the Secretary of the Interior * * *."

Section 7 (see Appendix, *infra*, p. 23) provides that "the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof * * *." Section 7 further provides that, beginning with the expiration of five years from the passage of the Act, petitioner shall pay to the United States $15,000 annually for a period of ten years, $20,000 annually for the

next ten years, and $30,000 annually for the remainder of the term of the grant "unless in the discretion of Congress the annual charge should be increased or diminished * * *." With respect to these sums, Section 7 directs that, unless otherwise provided by Congress, "said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and other improvements in the Yosemite National Park and other national parks in the State of California."

As additional consideration for the grant, Section 9(q) provides in full:

> That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir *and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.* [Emphasis added.]

B. In particular, Section 9(p) requires petitioner to build certain specific roads and trails which may be described as follows (R. 12):

> 1(a). a scenic road or trail on the north side of the Hetch Hetchy Reservoir site above and along the proposed lake to such point as may be designated by the Secretary of the Interior, and

(b). leading from said scenic road or trail, a trail to the Tiltill Valley and to Lake Vernon;

2. a road or trail to Lake Eleanor and Cherry Valley via McGill meadow;

3. a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site—referred to as the Mather Hetch Hetchy Road;

4. a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road, in section four, township one south, range twenty-one east, Mount Diablo base and meridian—referred to as the Mather Harden Lake Road.

As of 1930, petitioner had constructed the roads and trails enumerated in paragraphs 1(a), 2, and 3 (R. 14-15).

On December 4, 1930, petitioner submitted to the Secretary of the Interior a program relating to these roads and trails in Yosemite National Park (R. 16). The Secretary accepted the program on December 8, 1930 (R. 19-20), and the agreement was approved by petitioner's Board of Supervisors on February 2, 1931 (R. 21). In pertinent part, this agreement provided that petitioner would construct the trail specified in paragraph

1(b), *supra*, p. 6 (R. 16); petitioner would make certain improvements to the road specified in paragraph 3, *supra*, p. 6—the Mather Hetch Hetchy Road (R. 16); petitioner would pay to the United States the sum of $750,000 for the construction by the Department of the Interior of the road specified in paragraph 4, *supra*, p. 6—the Mather Harden Lake Road—payment to be made in equal installments of $250,000 in July, 1932, July 1933, and July 1934 (R. 16-17); and petitioner would pay to the United States the additional sum of $500,000 for the construction by the Department of the Interior of a road from Mather Harden Lake Road to Crane Flat, payment to be made in installments of $250,000 on July 15, 1935, and July 15, 1936 (R 17).[1]

The agreement stated that, upon petitioner's performance of this program, "the City will be considered to have complied with all of the provisions of said Raker Act as to the construction of roads and trails, and shall be considered to have performed its obligations in regard thereto * * *." (R. 18). It further provided, however, that (R. 18-19):

> * * * nothing herein contained shall change or modify the present obligations of the City as

[1] The road from Mather Harden Lake Road to Crane Flat was not expressly mentioned in Section 9(p). But, as noted above, p. 4, Section 9(p) also required petitioner to construct "such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior."

to the maintenance or upkeep of roads under said Raker Act.

On September 27, 1932, petitioner submitted a so-called "Second Supplemental Agreement" which stated that "The grantee desires to clarify and simplify the said agreement of December 8, 1930" (R. 27-31, 28). In fact, there was no agreement intermediate between the original agreement and the "Second Supplemental Agreement" (R. 21). The Secretary of the Interior approved the Supplemental Agreement on October 27, 1932 (R. 30, 21).[2]

In pertinent part, the 1932 Supplemental Agreement provided that the five annual payments of $250,000 each would "completely liquidate all of the road and trail construction commitments made by the City of San Francisco under the Raker Act, and as interpreted by subsequent negotiations" (R. 28), and that these moneys might be used for the construction of the roads agreed upon by the parties and designated upon the map (R. 31) at-

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[2] Petitioner asserts that the Supplemental Agreement "was the only Agreement" and that no agreement was adopted until October 27, 1932 (Pet. 9). The Agreed Statement, however, refers to the earlier proposal of the petitioner as "the original agreement" (R. 21, par. 5); the warrants issued by petitioner in payment of the annual installments of $250,000 state on their face that they are for road construction in conformity with the agreement of December 8, 1930 (R. 23-24); and the Supplemental Agreement itself states that it purports "to clarify and simplify the said agreement of December 8, 1930" (R. 28).

attached to the agreement (R. 28).[3] Of particular importance here, the Supplemental Agreement cancelled the savings proviso of the original (1930) agreement with respect to petitioner's obligation to maintain the roads (*supra*, pp. 7-8) and provided instead (R. 28):

> That the City of San Francisco will no longer maintain any roads or trails within the boundaries of Yosemite National Park.

Pursuant to these agreements, petitioner constructed the trail specified in paragraph 1(b), *supra*, p. 6 (R. 14); made the required improvements to the road specified in paragraph 3, *supra*, p. 6—the Mather Hetch Hetchy Road (R. 15); and paid to the United States the total sum of $1,250,000 during the period 1932-1936 (R. 22-24). As of September 3, 1937, the Mather Harden Lake and Crane Flat Roads had not been built and the United States had expended $1,000,000 of the $1,250,000 on the construction of roads (R. 25), none of which were specifically listed in Section 9(p) (R. 26).

To summarize petitioner's performance of its obligations under Section 9(p) of the Act: All of the roads expressly therein enumerated were constructed by petitioner except the Mather Harden Lake Road. In lieu of constructing the Mather

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[3] Designated on the map (R. 31) are the Mather Harden Lake Road, the road from Mather Harden Lake Road to Crane Flat, and roads from Crane Flat to Tioga Pass.

Harden Lake Road and certain other roads prescribed by the Secretary under the authority vested in him by Section 9(p), *i.e.*, the roads designated upon the map attached to the Supplemental Agreement (R. 31), petitioner paid to the United States the sum of $1,250,000.

C. With respect to Section 7 of the Act, it is stipulated that petitioner had, as of the time this suit was filed, made the annual payments therein required, *i.e.*, $15,000 annually during the years 1919 to 1928, $20,000 annually during the years 1929 to 1938, and $30,000 annually from 1939 to 1948 (R. 24-25). These payments were independent of those made under the 1932 Supplemental Agreement (R. 24).

D. As to petitioner's obligation under Section 9(q) of the Act to "reimburse the United States Government for the actual cost of maintenance of the above roads and trails," it is stipulated that the United States expended the sum of $27,313.82 for maintenance and repair during the fiscal years 1929 to 1940, and that this sum was the reasonable cost of the maintenance and repair (R. 14, 9-11). On September 8, 1939, the United States demanded of petitioner in writing that petitioner reimburse the United States for said cost of maintenance (R. 26). In reply, petitioner wrote to the United States denying liability (R. 26). Relying upon the Supplemental Agreement, petitioner denied

that it is indebted in this sum, or in any amount, for maintenance and repair (R. 8).

E. On these facts, the District Court entered judgment for the United States in the sum of $27,313.82, and costs (R. 46). The Court of Appeals affirmed, holding that the Secretary of the Interior had no authority under the Raker Act to enter into the Supplemental Agreement and that the Supplemental Agreement was therefore void and illegal (R. 100-101). The Court of Appeals further held that no estoppel could be raised against the United States in the circumstances of this case (R. 101-102).

ARGUMENT

In holding that the Secretary of Interior lacked authority under the Raker Act to release petitioner from its obligation under Section 9(q) of the Act, the Court of Appeals has correctly decided a question which is of importance only to petitioner and the United States, since the Act applies only to petitioner, and which is of limited importance even to the parties, since the decision does not purport to pass upon the scope of the Secretary's authority over petitioner's obligations under other provisions of the Act. And in holding that the United States is not estopped by the unauthorized actions of the Secretary, the court below has simply applied a well-settled rule often reiterated by this Court and previously expressly applied by the

Court to unauthorized acts of the Secretary of the Interior under the Raker Act. Cf. *United States* v. *City and County of San Francisco,* 310 U.S. 16. Further review is therefore not warranted.

1. In unequivocal language, Section 9(q) of the Raker Act provides that "in addition to the sums provided for in section seven it [petitioner] shall reimburse the United States Government for the *actual* cost of maintenance of * * * roads and trails in a condition of repair as good as when constructed." [emphasis added]. In direct conflict therewith, the 1932 Supplemental Agreement between petitioner and the Secretary of the Interior provides that "the City of San Francisco will no longer maintain any roads or trails within the boundaries of Yosemite National Park." (R. 28). Arguing that the Supplemental Agreement is valid, petitioner contends that, pursuant to that agreement, it has discharged its obligation to reimburse the United States for the actual cost of maintenance by making payment in advance. But nowhere in the Act is there any language which purports to authorize the Secretary to release petitioner from its statutory obligation in return for a sum fixed by him in the exercise of his discretion. Moreover, the command of Section 9(q) that petitioner reimburse the United States for the *actual* cost of maintenance refutes petitioner's claim that that section permits payment in advance. Advance

payment of the estimated cost of maintenance cannot be deemed to be in compliance with the requirement that petitioner pay the actual cost of maintenance.[4]

2. Petitioner contends, however, that the Secretary is generally empowered to administer the Act and that Congress specifically reserved for itself only the single function of increasing or diminishing the annual payments provided for in Section 7. In this connection, petitioner emphasizes that the Act names the Secretary in some forty-two instances with respect to various conditions. Particular reliance is placed on the provision in Section 9(p) "that all trail and road building and maintenance by the said grantee in Yosemite National Park * * * shall be done subject to the direction and approval of the Secretary of the Interior * * *" and upon Section 9(r) which provides "[t]hat in case the Department of the In-

[4] In fact, the Supplemental Agreement does not allocate any part of the $1,250,000 paid by petitioner to the estimated cost of maintenance. That sum covered both petitioner's maintenance obligation and its obligation to build roads and trails under Section 9(p). The original (1930) agreement allocated $750,000 for the construction of the Mather Harden Lake Road and $500,000 for the construction of a road leading from that road to Crane Flat (R. 16-17). Under the 1932 Supplemental Agreement, the total amount of $1,250,000 was to be expended not only on these two roads but on other designated roads as well (R. 28, 31). See *supra*, pp. 6-9. As of 1937, $1,000,000 had been spent on the other roads and only $250,000 remained for the construction of the Mather Harden Lake and Crane Flat Roads, whose estimated cost of construction in 1930 was $1,250,000 (R. 25).

terior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee." We submit that petitioner's construction of the Act finds no support in these provisions and is completely at odds with the language of the Act, read as a harmonious whole, and the Act's legislative history.

a. The very fact that Congress deemed it necessary to enumerate expressly the duties and functions of the Secretary of the Interior with respect to some forty-two provisions reveals that the drafters were fully aware of the language necessary and appropriate to vest administrative authority in the Secretary and that they took pains to employ such language only where it was intended to confer such authority. We think it highly significant, therefore, that Congress made no reference whatsoever to the Secretary in Section 9(q).

Further, reading the provision in Section 9(p) (upon which petitioner relies) in the light of Section 9(q), it is apparent that petitioner's construction of the former is entirely mistaken. To begin with, petitioner's obligation to reimburse the United States for the actual cost of maintenance of the roads and trails is imposed by a separate subsection of the Act (Section 9(q)), and

is independent of and distinct from petitioner's obligation to build and maintain roads and trails subject to the direction and approval of the Secretary (Section 9(p)). Section 9(q) refers to maintenance undertaken by the United States rather than by petitioner and requires petitioner to reimburse the United States for the actual cost incurred by the United States. Section 9(p), on the other hand, relates to "maintenance by the said grantee" and directs that such maintenance by petitioner "be done subject to the direction and approval of the Secretary."

Plainly, the correct interpretation of this language of Section 9(p) referring to the Secretary is merely that he is empowered to determine such matters as construction specifications, the need for repairs, the kind of repairs, and the adequacy of the construction and maintenance work. To contend that this language goes further and authorizes the Secretary to release an obligation expressly assumed by petitioner in another and unqualified portion of the Act is to distort its plain meaning. Significantly, the Secretary's authority to prescribe which roads shall be constructed in addition to the ones enumerated is contained in another part of Section 9(p)—*i.e.*, the provision that petitioner shall build "such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior". Accordingly, the words "under the direction" of the Secretary in the proviso upon which petitioner

relies cannot be given the all-inclusive meaning urged here.

b. Petitioner's reliance on Section 9(r) is palpably erroneous. That section does not purport to confer any authority upon the Secretary to waive compliance with the conditions of the Act. It simply provides that petitioner shall bear the expense resulting from "investigations and decisions" made by the Department of the Interior under the Act. The Secretary's authority to make such "investigations and decisions" is expressly conferred by the forty-two other provisions referred to by petitioner and not by Section 9(r). See H. Rep. No. 41, 63d Cong., 1st Sess., p. 15.[5]

c. Similarly, petitioner can derive no comfort from Section 7. The fact that Congress reserved to itself the power to increase or diminish petitioner's obligations in this single instance does not mean, as petitioner suggests, that its other obligations might be diminished by the Secretary. To the contrary, the provision demonstrates that Congress envisioned that only this one obligation imposed by Section 7 might be lessened or waived, and also compels the inference that Congress did not intend to delegate such a power to an executive official. It must be remembered that petitioner's obligation

[5] "Paragraph (r) provides that the grantee shall pay all the cost of inspection and investigations which may be required of the Department of the Interior where such investigations and inspection involve expense to the department."

under Section 9(q) to reimburse the United States for the actual cost of maintenance is specifically there stated to be "in addition to the sums provided for in section seven" and that Section 7 directs that the annual payments provided for in Section 7 "shall be kept in a separate fund by the United States, to be applied to the * * * maintenance of roads and trails * * *." In the light of this affinity between the payments under Sections 7 and 9(q), it is hardly likely that Congress intended to delegate to the Secretary the power to diminish or waive payments for the actual cost of maintenance while reserving for itself the right to diminish only the fixed annual payments for maintenance. Rather, in view of the language of Section 9(q), it must be assumed that Congress intended that petitioner's obligation to reimburse the United States for the actual cost of maintenance would be fixed, and that only the payments under Section 7 would be subject to alteration.

In fact, no assumption is necessary. Mr. Raker, the sponsor of the Act, flatly declared, without contradiction by any member of the House, that "the city and county of San Francisco will keep up these roads from now until the crack of doom." 50 Cong. Rec. 3902. He also pointed out that petitioner was obtaining the grant "upon conditions provided for by this bill—not to be fixed by any Cabinet officer or executive officer, but fixed in this bill by the Congress itself * * *." 50 Cong. Rec. 3900-3901. This comment was emphasized by Mr.

Kahn, the Representative from San Francisco, who reiterated that "under the terms of this bill Congress does not relinquish its right to fix the charges that will be paid by the city. It is not left to any executive officer, but it is always in the hands of the Congress of the United States." 50 Cong. Rec. 3901. In the light of these statements and the statutory language, both courts below were clearly correct in concluding that the Secretary of the Interior had no authority to enter into the 1932 Supplemental Agreement.[6]

3. It has long been settled that the United States is neither bound nor estopped by the unauthorized acts of its agents. *E.g., United States* v. *City and County of San Francisco,* 310 U.S. 16, 32; *United States* v. *California,* 332 U.S. 19, 39-40; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384; *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 294; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 408-409.

In the earlier *San Francisco* case, *supra,* this Court specifically applied this rule to actions of

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[6] Petitioner argues (Pet. 18-21) that the Secretary's construction of his authority under the Act is entitled to great weight. The courts below did not dispute this general principle, nor do we. The courts below held only that the Secretary did, in fact, exceed his authority and misinterpret the Act. It is, of course, not unusual for long standing administrative interpretations to be ruled erroneous. Cf. *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32; *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672, 678, n. 5, 689, 693; *Jewell Ridge Corp.* v. *Local No. 6167, United Mine Workers of America,* 325 U.S. 161, 169.

the Department of the Interior in the period from 1913 to 1937 under the Raker Act. Petitioner first argues that the earlier case is not controlling since it involved Section 6 of the Act, but it is obvious that the difference in the statutory provision involved can have no relevance to the question of estoppel.

Petitioner also contends (Pet. 16), referring to a statement of Representative Cramton printed in the Appendix to the Congressional record in the Seventy-first Congress, that the present case is different in that the agreement here was reported to Congress. But Representative Cramton's statement is dated December 9, 1930, and has reference to the original agreement submitted by petitioner on December 4, 1930, approved by the Secretary on December 8, 1930, and approved by petitioner's Board of Supervisors on February 2, 1931. The original 1930 agreement, as noted above, pp. 7-8, expressly provided that it did not modify petitioner's obligation to maintain the roads and trails. Accordingly, the material cited by petitioner does not constitute Congressional ratification of the entirely different language of the 1932 Supplemental Agreement. Moreover, such statements in the Appendix to the Congressional Record are of little significance (cf. *United States* v. *Lindsay*, 346 U.S. 568) and even if such subsequent events did support petitioner, they "would not supplant the contemporaneous intent of the Congress which enacted the" Raker Act. *Fogarty* v. *United States*,

340 U.S. 8, 14; cf. *United States* v. *United Mine Workers,* 330 U.S. 258, 281-282.

Last, petitioner argues that, in passing the Raker Act, the United States was acting in a proprietary capacity and that the United States is subject to estoppel when acting in a proprietary capacity. But the governmental-proprietary dichotomy has no application to issues such as this. "The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental." *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102; cf. *Federal Crop Ins. Corp.* v. *Merrill, supra* at 383-384; *Pittman* v. *Home Owners' Loan Corp.,* 308 U.S. 21, 32; *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 477.[7] Petitioner raised this same point in

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[7] Petitioner's reliance on *Yosemite Park & Curry Co.* v. *Collins,* 20 F. Supp. 1009 (statutory three-judge court, N. D. Cal.), reversed, 304 U.S. 518, confuses two different legal problems. The question involved in that case was whether the Government merely owned proprietory rights in the Yosemite Valley and Yosemite National Park or whether the United States also exercised sovereign jurisdiction over those lands to the exclusion of the State of California. That question, which concerned Art. 1, § 8, Cl. 17 of the Constitution, is not presented here. Rather, the issue here is whether, in disposing of its public lands under Art. 4, § 3, Cl. 2 of the Constitution, the United States exercises a governmental or proprietary function. The distinction between the two problems was recognized in the *Yosemite Park & Curry Co.* case, *supra,* in that the district court pointed out that the United States had the power to accept exclusive jurisdiction over the national park because the establishment of national parks is a governmental function (20 F. Supp. at 1013). See also *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 141-149.

the earlier *San Francisco* case. There, as here, petitioner argued that the Raker Act was a grant by a proprietor rather than by a sovereign. It accordingly contended that Section 6 of the Act was an unconstitutional invasion of the rights of the State of California and must, therefore, be deemed to be an illegal covenant in a contract between petitioner and the United States. See Brief for Respondent, No. 587, October Term, 1939, pp. 166-181; Appendix to Brief for Respondent, *supra,* pp. XXIX-XXXII. The Court rejected this contention, stating that "[t]he power over the public land thus entrusted to Congress [by Article 4, § 3, Cl. 2 of the Constitution] is without limitations" (310 U.S. at 29) and reiterating that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit" (310 U.S. at 32).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General,

WARREN E. BURGER,
Assistant Attorney General,

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

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APPENDIX

Sections 7, 9(p), 9(q), and 9(r) of the Raker Act (Act of December 19, 1913, 38 Stat. 242) provide as follows:

> SEC. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.
>
> SEC. 9. That this grant is made to the said grantee subject to the observance on the part

of the grantee of all the conditions hereinbefore and hereinafter enumerated:

* * * * *

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior, may determine, above and along the proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site, and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road, in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and main-

tain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

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